Nos. 12195 and 12196

In the United States Court of Appeals for the Ninth Circuit

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

TADAYASU ABO, ET AL., ETC., APPELLEES

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

MARY KANAME FURUYA, ET AL., ETC., APPELLEES

ON APPEALS FROM ORDERS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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No. 12195

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

TADAYASU ABO, ET AL., ETC., APPELLEES

No. 12196[1]

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

MARY KANAMA FURUYA, ET AL., ETC., APPELLEES

ON APPEALS FROM ORDERS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, ISSUING WRITS OF HABEAS CORPUS

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Orders of the United States District Court for the Northern District of California granting writs of habeas corpus were entered on August 11, 1947 (R. 191–194) and notices of appeal were filed September 8,

See footnote on p. 2.

1947 (R. 198).[1] This Court has jurisdiction to review the orders of the District Court under Title 28, United States Code, Section 2253.

QUESTION PRESENTED

Whether the Court below properly held that appellees' (hereinafter referred to as petitioners) status was not that of citizens or subjects of Japan and therefore not within the scope of the provisions of the Alien Enemy Act of 1798 (50 U. S. C. § 21).

STATUTES INVOLVED

The pertinent provisions of the Alien Enemy Act of 1798 (50 U. S. C. § 21) and those of § 403 (a) of the Nationality Act of 1940, as amended by the Act of July 1, 1944 (58 Stat. 677; 8 U. S. C. 803 (a)) are set forth in the Appendix *infra* pp. 34–35. Section 401 (i) of the Nationality Act of 1940 as amended by the Act of July 1, 1944 (58 Stat. 677; 8 U. S. C. 801 (i)), is as follows:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * * Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever

[1] By stipulation and order (R. 219) the Transcript of Record in No. 12196 was not printed on appeal and is held in abeyance pending a final judicial determination of the appeal in No. 12195, and in the event that the final decision of the Court on No. 12195 proves to be dispositive of the issues of fact and of law involved in No. 12196, the final judicial decision herein shall also be the final judicial decision therein on said issues of law and fact. Accordingly, all record references are to No. 12195.

the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; * * *

STATEMENT[2]

This is an appeal by the appellant (hereinafter referred to as respondent) Bruch G. Barber, District Director of Immigration and Naturalization Service, as successor in office to Irving F. Wixon, from an order made and entered on August 11, 1947, by the Honorable Louis E. Goodman, United States District Judge, granting a Writ of Habeas Corpus for the release of each of the petitioners and from the Orders made and entered on that same day denying respondent's motions for summary judgment, to strike and dismiss the amended petition, and granting petitioners' motion for a summary judgment and for a judgment on the pleadings (R. 191–193).[3]

[2] This Statute, together with certain other permanent wartime laws, was rendered inoperative by the Joint Resolution of July 25, 1947, c. 327, Sec. 3, 67 Stat. 451 (Public Law 239, p. 7, 80th Cong., 1st Sess.) However, for the purposes of removing those appellees still under Removal Order, a state of war still exists between United States and Japan. *Ludecke* v. *Watkins*, 335 U. S. 160.

[3] On June 30, 1947, the District Court entered an order granting applications for the Writ of Habeas Corpus of petitioners (R. 175–177). The respondent filed motions to Reconsider and Vacate the aforesaid Order of June 30, 1947 (R. 178; 186–187). The Motions to Vacate and Reconsider were denied by the Court (R. 182–185) and the Court issued a Writ of Habeas Corpus addressed to Irving F. Wixon as the District Director of the Northern District of California for the Immigration and Naturalization Service ordering the petitioners released from his custody and restored to their liberty (R. 195).

The petitioners filed an amended petition for a Writ of Habeas Corpus in the Court below on August 15, 1946 (R. 99), praying that the same be issued and directed to respondent, Ivan Williams, as the officer in charge of the United States Department of Justice of the Immigration and Naturalization Service of the Tule Lake Center, commanding him to release the said petitioners from his custody and to restore them to their liberty.

In the amended petitions for the Writ of Habeas Corpus it is alleged that each petitioner is a person of Japanese ancestry born in the United States and resident in the Northern District of California, and that none of them ever was or is an alien enemy, an alien, or a native, citizen, denizen or subject of Japan or of any hostile or foreign nation (R. 100–101). The respondent in an amended return admitted that each of the petitioners was a person of Japanese ancestry, a native domiciliary of the United States and a resident of the Northern District of California, but asserted that each petitioner was an alien and a citizen and subject of Japan and that the Attorney General had made a finding of dangerousness as to each petitioner acting within his powers pursuant to the Alien Enemy Act of 1798, and the Presidential Proclamations 2525 and 2655 and the Regulations issued by him thereunder (R. 134–135). The respondent denied that any of the petitioners were then citizens or nationals of the United States or that any of them were loyal to the United States and further admitted that each of the petitioners was interned and held under Order of Removal from the United States by the

Attorney General acting pursuant to the Alien Enemy Act of 1798 and the Presidential Proclamations and Regulations cited above.[4]

In the amended petitions for a Writ of Habeas Corpus the petitioners also requested that the Court find and adjudge that their renunciations of United States nationality were null, void and of no effect and that any approval thereof made by the Attorney General of the United States was and is null, void and of no effect (R. 127). The respondent admitted that the petitioners renounced their United States Citizenship but asserted that each was approved by the Attorney General as required by statute and regulation and that each of said renunciations was valid and legally effective (R. 136).

On October 10, 1946, the petitioners filed a Motion to Strike certain matter from the amended return (R. 145–148) and on that same day filed a traverse to matters contained in the amended return specifically denying, among other things, that the petitioners or any of them were aliens or citizens, or subjects of Japan (R. 149–153). On October 14, 1946, the petitioners filed Motions for Summary Judgment and Judgment on the Pleadings that a Writ of Habeas Corpus be awarded and issued to them (R. 154–157) and respondent on November 12, 1946, filed Points and Authorities in opposition to petitioners' Motion for

[4] Except as to 302 petitioners the cause has long been moot due to administrative action cancelling the removal orders under which appellees were held. See designation of plaintiffs set forth in the appendix to the Appellants' brief in No. 12251 at pp. 6–11.

Summary Judgment and in support of his Cross Motion of Summary Judgment (R. 161).

In an Order granting applications for a Writ of Habeas Corpus on June 30, 1947, the District Court rendered an opinion that the petitioners were not alien enemies under the Alien Enemy Act of 1798 and hence could not be held for removal or deportation from the United States, pursuant to the said Alien Enemy Act (R. 175). In so ruling the Court held that it was not necessary to determine the alleged invalidity of the renunciations of citizenship of petitioners urged in support of the applications in the Habeas Corpus proceeding (R. 175–177). Respondent's Motions to Vacate the Order granting applications for Writ of Habeas Corpus and reconsideration of their Cross Motion for Summary Judgment and for Order granting the same were denied on August 11, 1947 (R. 182–185). The District Court held that appellees were not citizens or subjects of Japan, an enemy country, within the provisions of the Alien Enemy Act of 1798 (50 U. S. C. § 21) and that, consequently, they could not be removed or deported under that Act, at least, as long as they continued to reside in the United States. Orders for the issuance of the Writ were made on August 11, 1947 (R. 182–185; 191–193.

Such denial of respondents' motions and the issuance of the Writ of Habeas Corpus were predicated upon the holding of the District Court that petitioners, because they were born in the United States could not, upon renunciation of United States Citizenship, become alien enemies within the purview of the Alien

Enemy Act of 1798, since a native born resident American citizen of Japanese ancestry could not at the same time be a citizen of Japan and that, hence, upon renunciation of American citizenship in the United States such person did not become an alien until he had voluntarily departed from the United States. The Court further held that no native born resident American citizen, who renounced his American citizenship pursuant to Section 801 (i), may be removed from the United States pursuant to the said Alien Enemy Act of 1798 as long as he continues to reside in the United States (R. 182–185).[5]

SPECIFICATION OF ERRORS RELIED UPON

The District Court erred:

(1) In holding that appellees, native born resident American citizens of Japanese ancestry, could not at the same time, be citizens of Japan.

(2) In holding that appellees upon renunciation of their American citizenship in the United States, did not become aliens unless and until they had voluntarily departed from the United States.

(3) In holding that the appellees, upon renunciation of United States citizenship did not become alien enemies under the provisions of the Alien Enemy Act of 1798 (50 U. S. C. Sec. 21) and hence could not be lawfully detained for removal for deportation from the United States pursuant to said Act.

(4) In holding that appellees, being native born citizens of the United States, could not, subsequent to their renunciation of American citizenship pursuant

[5] This decision is officially reported at 76 F. Supp. 664.

to Section 401 (i) of the Nationality Act of 1940 as amended (Act of July 1, 1944, 58 Stat. 677; 8 U. S. C. 801 (i)) be removed from the United States pursuant to the said Alien Enemy Act of 1798 as long as they continued to reside in the United States.

SUMMARY OF ARGUMENT

I. Petitioners were native-born citizens of the United States of Japanese ancestry who renounced their American citizenship pursuant to the provisions of Title 8, U. S. C. § 801 (i). They were interned as dangerous alien enemies subsequent to their renunciations, on the ground that they had been dual nationals and continued to possess their Japanese citizenship; hence were alien enemies subject to internment and removal under the Alien Enemy Act of 1798 and Presidential Proclamations 2525 and 2655. Petitioners were subsequently released from such internment by the District Court upon the ground that a native-born resident American citizen cannot at the same time have any allegiance to any foreign government. It is submitted that the Court was in error because in so holding it, in effect, rejected the doctrine set forth in *Perkins* v. *Elg,* 307 U. S. 325, which held that as municipal law determined the acquisition of citizenship, it followed that a person could possess a dual nationality. This proposition is supported by holdings of this and other courts and is universally subscribed to by the authoritative writers on the subject.

II. The District Court, in arriving at its decision that petitioners were not citizens of Japan subsequent

to their renunciations of American citizenship, reasoned that it would be necessary for them voluntarily to depart from this country in order to become citizens of Japan and thus alien enemies. It is well established that Congress has the power to prescribe regulations for expatriation and to legislate the results flowing therefrom. It has on former occasions utilized this power to prescribe that if a native-born American citizen undertook certain acts, he would, as a result thereof, become an alien without the necessity of voluntarily departing from the United States. The exercise of this power has been consistently approved by the courts. It is therefore submitted that the District Court was in error in holding that it was necessary for these petitioners voluntarily to depart from the United States before they become Japanese citizens and, therefore, at the time of the approval of their renunciations by the Attorney General while they were resident in the United States they became alien enemies.

III. The District Court recognized that, as a matter of law, voluntary departure might not be necessary to convert native-born American citizens into aliens under certain circumstances, but stated that absent any express declaration of congressional intent, there was no justification for holding that persons born in the United States who renounced their citizenship under § 801 (i) became aliens while resident in the United States. Although there is no such express declaration in subsection (i), it is submitted that its legislative history clearly indicates that one of the purposes of Congress in enacting this legislation was

to permit dual nationals, such as the petitioners, to be interned and removed as alien enemies subsequent to their voluntary, formal written renunciations of United States nationality. It is well settled that the function of a court in the interpretation of a statute is to construe the language thereof so as to give effect to the intent of Congress, and that in determining such intent resort may be had to the legislative history. We submit that the intention of Congress in enacting § 801 (i), *supra,* is clear. It was to permit the renunciation of the American citizenship of dual nationals in order that such persons, desiring to do so, might thereby assume the role of alien enemies and hence, become subject to the provisions of the Alien Enemy Act. In preventing this intended operation of the Act, the District Court clearly erred.

ARGUMENT

I. The issue of dual nationality

Petitioners were, at the time of their renunciation of American citizenship, native born United States citizens of Japanese ancestry residing in the United States. After the execution and approval of their renunciations of United States citizenship by the Attorney General, they were interned and held under orders of removal issued by him on the ground that persons who possessed both Japanese and United States citizenship (R. 131, 135, 183), became alien enemies, and, hence, subject to the Alien Enemy Act of 1798 (50 U. S. C. § 21), upon casting off their American citizenship. They were interned as a result of a finding of dangerousness as to each of them by the

Attorney General acting within his powers pursuant to the Alien Enemy Act of 1798, the Presidential Proclamations 2525 and 2655 and the Regulations issued by him thereunder (10 F. R. 12189).

The respondent's concept of dual citizenship and its implications, namely, that prior to and at the time of their renunciation of American citizenship petitioners were also at the same time citizens of Japan and continued to be citizens of Japan when their alleged renunciations of American citizenship were effected, was unequivocally rejected by the District Court on the ground that the theory that a native born resident American citizen can at the selfsame time be an alien and citizen of a foreign state was "judicially wholly unsound," (R. 183). In further commenting upon the respondent's concept of dual citizenship the Court stated as follows (R. 184):

> The dual citizenship concept in the field of international law (with which we are not here concerned) has to do with situations in which two different sovereigns may lawfully, within their respective territorial confines, claim citizenship of the same person, and he of them, and the international incidents and implications which result. *Talbot* v. *Jansen,* 3 Dall. 131, 164; *Perkins* v. *Elg.* 307 U. S. 325. But that such person may occupy a dual citizenship status, in the sense that he possesses simultaneously the citizenship of the sovereign state in which he is a domiciled native and that of a foreign sovereign as well, with all the attendant rights and obligations of both, is a principle to which no government would willingly subscribe.

It is submitted that in expressing such opinion, the District Court was in error. In *Perkins* v. *Elg,* 307 U. S. 325, 329, the Supreme Court had occasion to discuss the principle of dual nationality. The facts of that case show that Miss Elg was born in the United States in 1907. Her parents, natives of Sweden, immigrated to the United States and her father was naturalized here in 1906. In 1911 her mother took her to Sweden where she continued to reside until 1929. Her father went to Sweden in 1922 and in 1934 made a statement before an American Consul in Sweden that he had voluntarily expatriated himself for the reason that he did not desire to retain the status of an American citizen and wished to preserve his allegiance to Sweden. In 1929 Miss Elg returned to the United States and was admitted as a citizen. In 1935 she was notified by the Department of Labor that she was an alien illegally in the United States and was threatened with deportation. In 1936 she applied for an American passport, but it was refused by the Secretary of State upon the ground that she was not a citizen of the United States. She began an action for a Declaratory Judgment on the ground that she was a citizen of the United States. The defendant moved to dismiss the complaint asserting that the plaintiff was not a citizen of the United States by virtue of the Naturalization Convention and Protocol of 1869 between the United States and Sweden (17 Stat. 809) and the Swedish Nationality Law, and Section 2 of the Act of Congress of March 2, 1907, 8 U. S. C. 17. The Supreme Court

in discussing the principles of dual nationality stated at page 329 as follows:

> As municipal law determines how citizenship may be acquired it follows that persons may have a dual nationality, and the mere fact that the plaintiff may have acquired a Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she had lost her own citizenship acquired under our law.[6]

Manifestly, therefore, the existence of a dual nationality and citizenship results from the operation of municipal law, and in many instances, including the instant case, it is for application by municipal, as distinguished from international, tribunals. It is also apparent from such statement that dual citizenships may be possessed simultaneously. Consequently, it is incorrect to say, as the District Court said, that a person may not simultaneously possess the citizenship of two sovereign states. The question in *Perkins* v. *Elg, supra,* was whether Miss Elg was subject to deportation, hence, as in the present case, there was clearly presented a question of municipal law. The question presented in the instant case is that of the authority of the Attorney General to interne and remove petitioners from this country on the ground that they are alien enemies. The answer to it depends, in part, upon the solution of the subordinate problems

[6] That a person may at the same time enjoy the rights of citizenship under 2 governments was early recognized in the case of *Talbot* v. *Jansen*, 3 Dall. 133, 169.

raised by the dual citizenship and right of expatriation of appellees. It is clearly a question of municipal law.[7]

The recognition of the existence of dual citizenship as affected by the application of the municipal law of this country is aptly illustrated by a number of cases in which courts recognized that a person could be at once a citizen of the United States and a national or citizen of a foreign country. The opinion in *Attorney General of the United States* v. *Ricketts,* C. A. 9, 165 F. (2d) 193, commences with the following language:

> This case presents a problem of dual nationality as affected by the provisions of the Nationality Act of 1940, 8 U. S. C. A. § 801.

In that case the Court stated at p. 195 that:

> By virtue of his American birth and the later naturalization of his father in Canada he was *at once* (italics supplied) a citizen of the United States and a Canadian national. His American citizenship was deemed to continue unless

[7] See, also, Moore, *International Law Digest*, volume III, p. 518; Hyde, International Law, vol. I, § 372; Borchard, *Diplomatic Protection of Citizens Abroad*, §§ 253–256; Van Dyne, *Citizenship of the United States*, pp. 20–25; 34–36; Oppenheim's *International Law*, vol. I, 1948 ed., p. 593; Fenwick, *International Law*, 3d ed., pp. 253–255; Hackworth, *Digest of International Law,* vol. III, § 255; Gettys, *The Law of Citizenship in the United States*, pp. 27–30; Flournay, *Dual Nationality and Election*, 30 Yale Law Journal, 546, 696–697. Even if it were conceded that the problem of dual citizenship here presented emanated solely from the field of International Law, it is also true that International Law is a part of our law for the application of its own principles, *The Paquete Habana*, 175 U. S. 677, 700; *Skiriotes* v. *Florida*, 313 U. S. 69, 72–73.

> he had been deprived of it through the operation of a treaty or Congressional enactment, or by his "voluntary action in conformity with applicable legal principles."

Similar recognition of the simultaneous possession, by persons born in the United States, or its outlying possessions, of American and Japanese citizenship is to be found in *United States* v. *Yasui,* 48 F. Supp. 40, 55, D. C. Oregon (modified 320 U. S. 115, as not being necessary for decision); *Okihara* v. *Clark,* D. C. Hawaii, 71 F. Supp. 319, 322; *Ishikawa* v. *Acheson,* D. C. Hawaii, 85 F. Supp. 1. See also *Podea* v. *Marshall,* D. C. Pa. 83 F. Supp. 216, 219, *Cf. Coumas* v. *Superior Court, San Joaquin County,* Sup. Ct. of Cal. 192 P. (2d) 449.

The rejection by the District Court of the respondent's concept of dual nationality is primarily predicated upon its unwillingness to accept the theory that an American citizen can, at the same time owe any allegiance to a foreign government. The court also stated that no nation or government would willingly subscribe to the principle that a person may be a dual citizen in the sense that he possesses simultaneously the citizenship of the sovereign state in which he is a domiciled native and that of a foreign sovereign state, with all the attendant rights and obligations of both (R. 183–184).[8] It is submitted that if such a view were accepted it would be tantamount to a refusal to recog-

[8] That the Court's observation is not entirely correct would seem to be indicated by the provisions of Chapter 17 of the British Nationality and Status of Aliens Act, 1914, 4, 5 George V, vol. 52, Law Reports (Statutes, 1914), pp. 36–37. Section 14 (I) of that Act provides as follows: "Any person who by reason of his

nize the existence of the problem by the mere assertion that the problem does not exist.[9] The accepted authorities on this phase of dual citizenship state that from the very fact that every state has the right to determine by its own law who shall be entitled to its citizenship, conflicts of law result and it frequently happens that a person has a dual nationality. In

having been born within his Majesty's dominions and allegiance * * * is a natural born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may, if of full age and not under disability, make a declaration of allegiance, and on making the declaration shall cease to be a British subject." By Section 7 of Chapter 14 of the British Nationality and Status of Aliens Act of 1943 (Law Reports, 1943, Stats. 6, 7, and 8 George VI, 1943) such declaration of alienage was not effective unless registered in accordance with regulation and, if made during war, unless it was registered with the permission of the Secretary of State. (The similarity between these statutes and 801 (i) of Title 8 U. S. C. is notable.) A form of such declaration of allegiance is set forth in the Appendix B. For an interpretation of the 1914 Statute and presumably the cause of the 1943 amendment to The Status of Aliens Act see *Rex* v. *Commanding Officer* (K. B. Div.), vol. XXXIII, The Times Law Report, pp. 252–253.

[9] Pursuant to Presidential Executive Order No. 6115 of April 25, 1933, an inter-agency committee composed of the Secretaries of State and Labor and the Attorney General, submitted on June 1, 1938, a proposed codification of the nationality laws of the United States, which code, as subsequently modified and amended by Congress, became the Nationality Act of 1940. The letter of submittal contained in pertinent part the following language: "The nationality problem in the United States is especially complex and difficult for several reasons. * * * Children born in the United States to persons of the class mentioned [persons of foreign origin having children born to them in the United States] acquire at birth citizenship of the United States, and in many cases they also acquire at birth the nationality of the foreign States from which their parents come, thus becoming vested with dual nationality."

respect to all persons as to whose nationality a difference of legal theory exists, international law has made no choice and it is left open to States to act as they like. As in conflicts of law in relation to other matters, States have shown a disposition to relax sovereign rights and have made mutual concessions by which the effects of conflicts of law in regard to nationality are to a considerable extent avoided. *Van Dyne, Citizenship of the United States,* p. 24.

The same view is held by Moore, who states:

> The doctrine of double allegiance, though often criticized as unphilosophical, is not an invention of jurists but is the logical result of the concurrent operation of two different laws. In the absence of a general agreement for the exclusive application, according to circumstance, of the one or the other of such laws, the condition that actually exists is described by the term double allegiance. An undisputed example of it is furnished by the case of a child, who, by reason of his parents being at the time of his birth in a foreign land, is born a citizen of two countries—a citizen of the country of his birth *jure soli* and a citizen of his parents' country, *jure sanguinis.* It is true that in such a case a double claim of allegiance potentially may not arise. For instance, the country of birth may not claim the allegiance of the child born on its soil to alien parents * * *. But if the conditions be otherwise and a double claim actually exists it is considered to have a valid foundation. A conflict, however, is obviated by the rule that the liability of the child to the performance of

> the duties of allegiance is determined by the laws of that one of the two countries in which he actually is." Moore, International Law Digest, vol. III, P. 518.

It would seem from an examination of these authorities that double allegiance, even in the case of a native-born American citizen can exist as a matter of law; that the State in which a particular dual national is resident may, but is not required to, claim his exclusive allegiance. However, the fact that exclusive allegiance may be claimed while resident, does not in itself negate the existence of the possession by the person of citizenship of another country.[10] Although by the law of the United States a person born in the United States of alien parents is considered a citizen of the United States, it is also true that the United States considers as citizens of this country, having equal status, persons who are born outside of the United States, and its outlying possessions, of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such persons, 54 Stat. 1138; 8 U. S. C. § 601 (c). In such a case, although the United States considers such a person to be a citizen of the United States, it does not deny the possibility

[10] For an excellent discussion of the problems arising out of the possession of dual citizenship see Buell, *Some Legal Aspects of the Japanese Question*, 17 Am. Jour. of Int. Law 29. The author, at p. 34, defines expatriation to be the act by which a person divests himself of citizenship in one nation and accepts, *if he does not already hold*, citizenship in another. [Italics supplied.]

of the simultaneous possession by such a person of another citizenship. *Van Dyne, Citizenship of the United States,* pp. 34–36. It is therefore apparent that the recognition by the United States, that by the law of Japan persons born in the United States of Japanese citizen parents are also Japanese citizens in certain cases,[11] even though the allegiance of such person who is resident in the United States *may* be exclusively claimed by this government, does not prevent the United States as a sovereign from waiving at any particular time a demand for continued exclusive allegiance even though such a person is a resident of the United States. It is submitted that

[11] The affidavits of Thomas M. Cooley II, dated respectively November 7 and December 3, 1946, submitted as part of Respondent's Points and Authorities in opposition to complainant's Motion for Summary Judgment and Cross Motion for Summary Judgment had annexed thereto memoranda setting forth the appropriate provisions of Japanese law which established that under Japanese law many of the appellees possessed Japanese nationality. Because of their length they are not being set forth herein nor have they been printed in the transcript of record pursuant to stipulation of the parties approved by this Court. The parties also stipulated that these documents need not be printed and that the same might be examined and considered by the Court, which stipulation was approved by this Court. For authoritative expression of the nationality laws of Japan, existing on December 7, 1941, see Flournay and Hudson, *Nationality Laws*, 1929, 381–388; Blakemore, *Recovery of Japanese Nationality as Cause for Expatriation in American Law*, July 1949, 43 American Journal of International Law, 441, 459. See also 10 American Journal of International Law 367 and Foreign Relations of the United States, vol. II, 1924, p. 411. The District Court's memorandum supporting its Order granting the Writ of Habeas Corpus tacitly assumed that by the law of Japan, appellees possessed, according to Japanese law, Japanese citizenship (R. 184).

an attribute of sovereignty is the power to sanction a voluntary abandonment of allegiance to it and the recognition of a claim of allegiance by another sovereign from a person who under such other sovereign's law is also its citizen. In the case of *The Exchange,* 7 Cranch 116, Chief Justice Marshall stated at p. 136:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. * * * all exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself * * * this consent may be either expressed or implied. In the latter case, it is less determinate; exposed more to the uncertainties of construction; but if understood not less obligatory.

The District Court in rejecting appellees' concept of dual citizenship ascribed as a reason for so doing that:

> An American citizen as such owes his entire allegiance to the United States and the United States is entitled to claim from him an indivisible loyalty. A naturalized citizen at the time of naturalization renounces all allegiance to any foreign government and swears undivided fealty to the United States. No less is the allegiance of a native-born citizen, for the Constitution makes no distinction between naturalized and native-born citizens (R. 183).

In addition to what has already been said with respect to (a) judicial recognition of the possession by

American citizens of a dual citizenship and allegiance, (b) the right to claim sole allegiance of a dual citizen while resident within the territory of a sovereign and (c) the power of such sovereign to waive such claim to allegiance, it seems that there is a distinction to be drawn between the cases of citizens born in the United States of alien parents and those persons born abroad who have obtained naturalization as citizens of this country. Secretary of State Lansing in a communication to Senator Lodge of June 9, 1915, states that, in the former cases, the Department of State recognizes that the persons concerned are born with a dual nationality and in the latter the Department did not recognize the existence of dual nationality in view of the fact that persons naturalized as citizens of this country are required to renounce their original allegiance, Hyde, *International Law,* vol. I, p. 665. It would seem that such a distinction is valid. See, 8 U. S. C. § 800.

We submit that appellees, in view of the foregoing authorities, even though native-born resident Americans, could be and were at one and the same time citizens of Japan and of the United States.

II. The issue of necessity of voluntary departure from the United States

In view of the Court's premise that native born resident American citizens could not at the selfsame time be a citizen of a foreign state, in this instance Japan, the portion of the Court's opinion which states that a native born American citizen who renounced his citizenship could not be an alien until he

had voluntarily departed from this country, logically follows, since the Court does not consider any legal incidents to flow from the possession of Japanese citizenship until the person arrives within the territorial limits of Japan or at least until he has departed from the territory of the United States. Therefore, if the Court's premise is correct it, perforce, could be conceded that its conclusions predicated thereon are also correct. Of course, as hereinbefore indicated, no such concession is made, since it is the respondent's position that appellees possessed Japanese citizenship not only while they were residents within the territorial limits of Japan but also while resident in the United States. We do not understand the Court's reference to the requirement for voluntary departure from this country, as meaning that the same is necessary to terminate American citizenship by one who had voluntarily renounced the same pursuant to the provisions of Title 8 U. S. C. 801 (i) *supra*.[12] As we read the Court's opinion a voluntary departure is, however, required in

[12] It is assumed that the Court was freely conversant with the provisions of Section 803 (a) Title 8 U. S. C., which by its terms authorizes expatriation under Section 801 (i) *supra*, while within the United States or any of its outlying possessions. Congress in enacting such provision obviously intended to circumvent the common law requirement of actual removal from a country in order to legally effectuate expatriation, i. e., the voluntary renunciation or abandonment of nationality; and allegiance as enunciated in such cases as *Talbot* v. *Jansen*, 3 Dall. 133; *The Santissima Trinidad*, 7 Wheat. 283, 346; *Comitis* v. *Parkerson*, 56 Fed. 556; *Ex parte Griffin*, D. C. N. Y., 237 Fed. 445, 450, see also *Fish* v. *Stoughton*, 2 Johnson's Cases 407 (N. Y. 1801), Cf. *U. S. ex rel de Cicco* v. *Longo*, D. C. Conn. 45 F. Supp. 170–174.

order to vitalize appellees' Japanese citizenship, and thereby create for them the status of aliens.

However, it can not be doubted that Congress has the power to prescribe regulations for expatriation and to legislate the results, with respect to citizenship, flowing therefrom, providing only that the same shall not be arbitrarily imposed without express or implied consent of the citizen. *Mackenzie* v. *Hare,* 239 U. S. 299, 311; *Petition of Peterson,* 33 F. Supp. 615–616; *United States ex rel Wronga* v. *Kornuth,* 14 F. Supp. 770–771. This power has been judicially approved in instances so as to permit citizens of the United States upon the voluntary accomplishment of stated acts, to become aliens while resident in the United States and without the necessity of voluntarily departing to the country whose citizenship has been acquired by such act. Conversely, Congressional power has been recognized to encompass the declaration that aliens residing in foreign countries may acquire United States citizenship under certain circumstances without ever residing in the United States. An instance of the first type of Congressional enactment mentioned above is to be found in the Act of March 2, 1907, c. 2534, 34 Stat. 1226, whereby it is provided that any American woman, who married a foreigner should take the nationality of her husband. At the termination of the marital relation, she might, under the statute, resume her American citizenship from abroad by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if

residing in the United States at the termination of the marital relation, by continuing to reside therein.[13]

The power of Congress to so convert a citizen of the United States into an alien without such person's departure from the United States is expressly approved in *Mackenzie* v. *Hare, supra.* The Court, in so deciding, stated at pp. 311–312:

> As a government the United States is invested with all the attributes of sovereignty. As it has the character of nationality, it has the power of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarassing such powers. * * * We concur with counsel that citizenship is of tangible worth. * * * But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment.

See also *In re Chamorra,* D. C. Cal., 298 Fed. 669–670.

Section 2 of the Act of 1907, 34 Stat. 1228, provided that any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws or when he has taken an oath of allegiance to any foreign state. The statute in express terms did not provide that such naturalization or the taking of an oath of allegiance to any foreign state would effect the expatriation of a United States citizen, if such acts were accomplished while he resided in the United States. This Act was recently construed by the United States Court of Ap-

[13] This section of the Act is repealed by Amendment of September 22, 1922, 42 Stat. 1021 (The Cable Act).

peals for the 7th Circuit in *Savorgnan* v. *United States,* 171 F. (2d) 155. In that case the plaintiff voluntarily obtained Italian citizenship while residing in the United States and the Court held that she had expatriated herself pursuant to the provisions of Section 2 of the Act of 1907 *supra,* and that a subsequent removal from this country was not necessary to effect such expatriation. A reading of such decision clearly indicates that the plaintiff in that case became an alien and that voluntary removal from this country was not necessary to produce such a status.

The second instance mentioned above, the power of Congress to convert an alien into a citizen of the United States without such person ever entering the United States, is illustrated by Section 2 of the Act of February 10, 1855 (§ 1994 Rev. St.) which provided that any woman who was married to a citizen of the United States and who might herself be lawfully naturalized shall be deemed a citizen.[14] That alien women married to United States citizens subsequent to passage of such Act became citizens of the United States, even though they never entered the territorial limits of the United States subsequent to such marriage, was held by respectable authority, *Kelly* v. *Owen,* 7 Wall. 496; *Burton* v. *Burton,* 1 Keys 359; *Lenard* v. *Grant,* 5 Fed. 11; 14 Op. A. G. 402, 406.

The District Court in holding that "possession of Japanese citizenship in Japan by a native born resident American of Japanese ancestry" who renounced his

[14] Repealed by Act of September 22, 1922, 42 Stat. 1021 (Cable Act).

citizenship under Section 401 (i) is not converted into an alien unless he voluntarily departed from the country, is evidently predicated in part upon the Court's rigid adherence and acceptance of a definition of the word "alien" to be, "One born out of the United States and who has not been naturalized under their constitution and laws" (R. 184). Of course, if that were the only possible definition of the word "alien" the appellees would not be aliens. However, as indicated by the above-mentioned cases and statutes, persons have been held to be aliens who were *not* born out of the United States and conversely, persons have been held to be citizens who were born out of the United States and were not naturalized in the usual sense of that word, "under their constitution and laws." The Court itself recognizes the difficulty of rigid adherence to definition in its reference to the case of *Reynolds* v. *Haskins,* 8 F. (2d) 473, but stated that, even though such were the case, absent any express declaration of Congressional intent, there was no justification for holding that persons born in the United States of parents who were Japanese citizens and who renounced their citizenship under Section 801 (i) *supra,* became aliens while resident in the United States. We submit that it can be demonstrated that the purpose of Congress in passing 801 (i) *supra,* was to convert, in time of war, certain persons who held dual citizenship and who voluntarily renounced their American citizenship into alien enemies and thus make such renunciants removable under the provisions of the Alien Enemy Act of 1798.

III. The issue of the scope and purpose of section 401 (i) of the Nationality Act of 1940 (8 United States Code, section 801 (i))

The District Court in its Opinion concluded that the only purport of the whole of Title 8, United States Code, Section 801, including the amendment by subsection (i) is to effect termination of American citizenship and that the said Nationality Act of 1940, together with its amendments, in no way fixes or determines any particular alien nationality for the expatriate. While admitting that the Alien Enemy Act of 1798, *supra,* broadly applied to "natives, citizens, denizens, or subjects" of a hostile nation or government, nevertheless, the Court held that "absent any express declaration of Congressional intent, there is no justification for holding that under the Alien Enemy Act, a native-born resident American citizen, who renounces his American citizenship pursuant to Section 801 (i), may be deported, at least, as long as he continues to reside here."[15] If the Court agreed with appellant's concept of dual citizenship, namely that when appellees' United States citizenship ceased to exist their Japanese nationality remained and that, accordingly, they were alien enemies under the provisions of the Alien Enemy Act of 1798, it would in no

[15] This portion of the Court's Opinion is not understood, for it is antithetical to state that a sovereign may not deport a person, "at least, as long as he continues to reside here." This is so for the reason that deportation is the act of removing an alien from a country and it is therefore difficult to understand a rule of deportation which can only be exercised, in effect, subsequent to the departure of a person from the territorial limits of a country. If, as suggested by the Court, such a right exists, it is indeed an empty one.

wise be necessary to examine the scope and intent of Congress in passing Subsection (i). In any event, we do not deem it necessary to generally discuss the whole of Section 801 of Title 8, United States Code, and such comment will be limited to the scope of Subsection (i) and the Congressional intent in its enactment. This latter is necessary because of the Court's reference to the absence of any express declaration of Congressional intent to have persons possessed of dual nationality considered aliens in contemplation of law, upon their renunciation of American citizenship under 801 (i).

At the outset, it may be admitted that there is no express provision in Subsection (i) which states that upon renunciation of United States citizenship, and its approval by the Attorney General as being contrary to the interests of national defense, such renunciant would become an alien of any particular nationality. The legislative history of Subsection (i), however indicates that this was not expressly stated because of Congressional opinion that the same would be unnecessary, particularly in the cases of persons born in the United States of parents who possessed Japanese nationality. The then Attorney General recommended the enactment of Subsection (i) to the Congress, and personally appeared before the Committee on Immigration and Naturalization, House of Representatives. In his testimony before this Committee, discussing the difference between the bill as proposed by him and other proposed bills providing for the loss of United States nationality of persons of Japanese descent, he stated as follows:

> A principal difference in the bill proposed by me is that it does not rely upon some Administrative determination concerning what particular conduct indicates loyalty to a foreign sovereign, but expressly provides for a formal written renunciation of United States nationality which would thereupon permit dual nationals, such as most Japanese, to be interned as alien enemies and eventually returned to Japan. (Hearings, House Committee on Immigration and Naturalization, 78th Cong., 2d Sess., on H. R. 4103.)

Examination of these hearings and Congressional debates demonstrates that the understanding of Congress in discussing this subsection was that most persons born in the United States of parents who possessed Japanese citizenship would, upon their renunciation of American citizenship, be subject to internment as alien enemies. Illustrations of such understanding are as follows:

> Mr. ENGLE of California. The Attorney General proposes a bill whereby these Japanese could sign a written renunciation of their nationality in the United States, which would put them in a position of being aliens, and thereby the government of the United States in a better position to deal with them now and after the war. There is only one basic difficulty in that bill, and that is that it requires a further and additional act of renunciation of loyalty on the part of these Japanese (90 Cong. Rec. 1786).

Again at page 1787 of Volume 90 of the Congressional Record the following statement is made by Representative Allen of Louisiana:

> Your Committee received the benefit of a thorough study of all these Bills by the Department of Justice and did not act on any Bill until the Department of Justice had a chance to give thorough study to the question. As a result of that thorough study by the Committee and as a result of the thorough study of the Department of Justice we have brought out this Bill [H. R. 4103] solely to enable persons to divest themselves of citizenship who say in writing that they do now want to remain citizens of this country, that they wish to give up their citizenship. We want such people to have a chance to become alien enemies. At the present time they are not alien enemies; they are American citizens. We want to convert their status from citizens of the United States to the position of Alien enemies.

In continuing the debate Mr. Allen stated at page 1788 of Volume 90 of the Congressional Record that:

> The Justice Department has made an exhaustive study of the law and tells us that there is now no way for disloyal persons to renounce their citizenship and thus become alien enemies. This Bill provides that way. That is all it does.[16]

In the debates in the Senate a similar understanding of the purpose and scope of Subsection (i), *supra,* is indicated. Senator Russell in explaining the purposes of H. R. 4103 (subsequently enacted as Section 401 (i) of the Nationality Act of 1940) stated:

[16] The statements of Mr. Allen in open debate in the House of Representatives is deserving of weight, since he was a member of the Committee on Immigration and Naturalization which conducted the hearings on H. R. 4103.

> In this country there are many persons of the Japanese race who really possess a dual citizenship. They were born in this country and have American citizenship. Many of them have been back in Japan and they really feel that their allegiance is to the Emperor of Japan. We are now detaining these people in relocation centers. Under the Bill if they apply voluntarily, to divest themselves of their American citizenship, they will be taken out of our relocation centers and interned as enemy aliens (90 Cong. Rec. 6617).[17]

It is submitted that from the foregoing debates and hearings there can be no question but that Congress intended, in enacting Section 401 (i) *supra,* that persons, in general, possessing dual citizenship and, in particular, persons born in the United States of parents possessing Japanese citizenship, who renounce their citizenship pursuant to said Subsection (i) would become alien enemies as a result of their possession of dual citizenship.[18]

While, as before stated, Section 401 (i) does not expressly fix or determine any particular alien nationality for the expatriate, there can be no doubt that a reasonable interpretation of that statute with respect to persons possessing dual citizenship, such as appellees possessed at the time of their renunciation, lead to the conclusion that upon renunciation they became alien enemies by virtue of their posses-

[17] See also H. Rept. No. 1075 and S. Rept. 1029 to accompany H. R. 4103, 78th Cong., 2d Sess.

[18] The conclusions of the District Court seem to imply that appellees, at most, became stateless. It is clear that no such intention was possessed by Congress in enacting 401 (*i*), *supra.*

sion of Japanese citizenship. A resort to the legislative history clearly indicates that such a result was intended. The Supreme Court in *United States* v. *American Trucking Association,* 310 U. S. 534, states (p. 542):

> In interpretation of statutes the function of the Court is essentially stated thus to construe the language so as to give effect to the intent of Congress. There is no unvarying rule for the discovery of that intention.

Again at page 543 the Court stated:

> There is, of course, no more pursuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has lead to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act * * *. Frequently, however, even when the plain language did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, this Court followed that purpose rather than the literal words * * *."[19]

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[19] To the same effect see *Levinz* v. *Will*, 1 Dall. 430–433; *Respublica* v. *Betsey*, 1 Dall. 468, 477; *Ozawa* v. *United States*, 260 U. S. 178, 194; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258; *United States* v. *Dickerson*, 310 U. S. 554, 561–562; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479; *Hirabayashi* v. *United States*, 320 U. S. 81; *Carolene Products Co.* v. *United States*, 323 U. S. 18, 28; *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 385.

We submit that in view of the legislative history of Subsection (i) the clear intent of Congress was that such persons as appellees, upon renouncing their American Citizenship pursuant to its terms, became citizens and subjects of Japan and, consequently, that they are alien enemies within the provisions of the Alien Enemy Act of 1798 and while in the United States, were subject to being detained and removed, pursuant to the terms of that Act. To hold otherwise, because the same was not expressly declared, would be to "fly in the teeth" of all manifest Congressional intent.

Compare the much quoted statement of Justice Holmes in *Johnson* v. *United States,* 163 Fed. 30, 32, where he stated: "It is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it and, therefore, we shall go on as before."

CONCLUSION

For the foregoing reasons it is respectfully submitted that appellees, possessed simultaneously United States citizenship and Japanese citizenship and that upon their renunciation of American citizenship, while resident in the United States they, because of their possession of Japanese citizenship, became alien enemies and, consequently, were liable to detention and removal pursuant to the provisions of the Alien Enemy Act of 1798. In view of this, the Order of the District Court granting a Writ of Habeas Corpus and the Orders denying appellant's Motions for Summary Judgment, to Strike and Dis-

miss the Amended Petition and granting appellees Motions for a Summary Judgment and for Judgment on the Pleading, should be reversed.

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Frank J. Hennessy,
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APPENDIX A

Title 50, U. S. C., section 21, reads as follows:

§ 21. *Restraint, regulation, and removal.* Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

Section 403 (a) of the Nationality Act of 1940, as amended, as it appears in title 8, U. S. C., 1946 edition:

§ 803. *Restrictions on expatriation; residence in United States; age.* (a) Except as provided

in subsections (g), (h), and (i) of section 801 of this title, no national can expatriate himself, or be expatriated, under this section while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and when the national thereafter takes up a residence abroad.

APPENDIX B

Statutory Rules and Orders—1943

Vol. I. (pp. 67–68)

British Nationality and Status of Aliens Act, 1914

DECLARATION OF ALIENAGE

I, A. B., of

. . .

being a person who, by reason of my having been born within His Majesty's dominions and allegiance [on board a British ship], am a natural-born British Subject, but who at my birth [during my minority] became under the law of a subject also of that State, and am still such a subject, and of full age and under disability,

. . .

do hereby renounce my nationality as a British subject.

(Signed) A. B.

Made and subscribed this day of before me,

(Signed) X. Y.,

[Justice of the Peace Commissioner, or other official title.]

U. S. GOVERNMENT PRINTING OFFICE: 1950